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PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Domingues	Examiner: Lien Tran
Serial No.: 09/945,204	Group Art Unit: 1794
Filed: August 31, 2001	
For: CHEMICAL LEAVENED DOUGHS AND RELATED METHODS	Docket No.: PIL0060/US

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Joni Jurek

APPEAL BRIEF

Dear Sir or Madam:

This Appeal Brief is being submitted in support of an Appeal from the Final Rejection mailed May 28, 2008, in connection with the above-identified patent application.

A Notice of Appeal was filed on September 24, 2008, and received in the US Patent Office on September 29, 2008, with the required fee of \$510.00 for the Notice of Appeal.

Enclosed is a check in the amount of \$540.00 for filing this Appeal Brief. It is believed that no other fee is required in filing this paper. However, if any other fee is required, then Applicant hereby authorizes such fee therefore to be charged to the Kagan Binder Deposit Account No. 50-1775 and notify us of the same.

Table of Contents

	PAGE
I. Real Party in Interest	3
II. Related Appeals and Interferences	4
III. Status of Claims	5
IV. Status of Amendments	6
V. Summary of Claimed Subject Matter	7
VI. Grounds of Rejection to be Reviewed on Appeal	10
VII. Argument	11
VIII. Appendix – Claims on Appeal	18
IX. Appendix – Evidence	23
X. Appendix – Related Proceedings	24

I. Real Party in Interest

General Mills Marketing, Inc., the assignee of record, is the real party in interest.

II. Related Appeals and Interferences

There are no related appeals and interferences.

III. Status of Claims

Claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59-70 are pending in the application. Claims 2, 4-7, 9, 14, 17-19, 21, 24, 27-35, 37-42, and 44-58 have been cancelled. Claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59-70 have been finally rejected and are the subject of this appeal.

V. Status of Amendments

No amendments have been proposed after Final Rejection.

V. Summary of Claimed Subject Matter

Note: The parenthetical citations below refer to the Applicant's specification and figures.

The specifically claimed subject matter of independent claim 1 is supported and described in the present application as follows:

1. A packaged dough product comprising a low pressure container having therein at least two individual portions of a chemically leavened dough product, wherein each portion comprises an encapsulated basic active ingredient, a non-encapsulated acidic active ingredient, and a barrier material (*page 4, lines 17-22; page 4, line 25 –page 5, line 3; and page 6, lines 3-15*), wherein

at below baking temperature the barrier material encapsulates the basic active ingredient and separates the basic active ingredient from the non-encapsulated acidic active ingredient to inhibit reaction of basic active ingredient and acidic active ingredient (*page 2, lines 7-18; page 2, line 30-page 3, line 4; page 5, lines 28-30; and page 6, lines 8-13*),

the non-encapsulated acidic active ingredient is selected to have a solubility of greater than 35 kcal/mole in the dough composition below baking temperature and to be substantially soluble in the bulk dough composition during baking (*page 14, line 6-page 15, line 4*),

the barrier material degrades at or above the baking temperature to allow the basic active ingredient and the acidic active ingredient to come into contact in the dough composition and react to substantially leaven the dough composition during baking (*page 5, line 31-page 6, line 2*).

The present invention relates to chemically leavened dough products (*page 1, lines 8-9*). At least two individual portions of the dough products are packaged in a low pressure container (*page 4, line 29 through page 5, line 3*). The composition of the dough product inhibits leavening, and therefore expansion of the dough, during both processing (i.e., the manufacture of the individual portions) and refrigerated storage

(page 2, lines 30 through page 3, line 10). Leavening does not occur until baking temperature is attained (page 3, lines 11-17).

The ability to control leavening provides the further benefit of eliminating the need for packaging that must withstand the pressure generated by prior art dough products (page 4, lines 25-27). As a result, low-pressure (including non-pressurized) containers can be used. This not only eliminates customer objections to the popping of pressurized containers when they are opened, it makes it possible to package fewer portions of the dough product in a container (page 4, lines 26-32).

The ability to control leavening until baking temperature is attained is due to three factors. The first is the combination of an encapsulated basic active ingredient and a non-encapsulated acidic active ingredient (page 5, lines 26-30; page 11, line 20 through page 12, line 9)

The second factor is the choice of the non-encapsulated acidic ingredient. Thus, the non-encapsulated acidic ingredient must have low solubility in the dough prior to baking (i.e., it has a solubility of greater than 35 kcal/mole in the dough) below baking temperature (page 13, lines 24 through 26; page 15 lines 2-4), but is substantially soluble in the dough during baking (page 14, lines 6-10).

The third factor is the ability of the barrier material to degrade at or above baking temperature so as to allow the basic and acidic active ingredients to contact each other and react to leaven the dough during baking (page 16, lines 5 through 9; page 17, lines 12 through 15).

The above-described features of the present invention eliminate the need to prepare the entire contents of the package once it has been opened. Because the present invention comprises two or more individual or discrete portions of the dough product, the consumer can prepare only that quantity of product desired. The remainder, i.e. the unused portion of the product can be returned to refrigerated storage for later use. This not only provides portion control to the consumer, it also eliminates waste of the product (page 4, line 29 through page 5, line 3).

Prior pressurized packages contain multiple servings of a product. Typically the servings are in contact with one another. Once these packages have been opened, their entire contents have to be baked at one time because otherwise the unbaked dough

product would expand and become unusable. As a result, the consumer had to discard that portion of the product that was not baked and/or consumed at the time of preparation. The present invention over comes this disadvantage of the prior art

VI. Grounds of Rejection to be Reviewed on Appeal

1. Whether claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59-65 are patentable under 35 U.S.C. 103(a) in view of Narayanaswamy et al (U.S. 6,261,613) in view of Ray et al (U.S. 6,004,595) and Gulstad et al (U.S. 3,767,421).

2. Whether claim 66 is patentable under 35 U.S.C. 103(a) in view of Narayanaswamy et al in view of Ray et al and Gulstad et al, further in view of Schaible et al (U.S. 6,365,210).

3. Whether claims 67-70 are patentable under 35 U.S.C. 103(a) in view of Narayanaswamy et al in view of Ray et al and Gulstad et al further in view of Rea et al (U.S. 6,053,400) and Lonergan et al (U.S. 5,672,369).

VII. Argument

Note: As used in this Argument section, unless otherwise specified, the phrase “Office Action” refers to the final Office Action mailed May 28, 2008.

Claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59-65 are patentable under 35 U.S.C. 103(a) over of Narayanaswamy et al in view of Ray et al and Gulstad et al.

Narayanaswamy et al disclose a refrigerated and shelf-stable bakery dough product. The Examiner has acknowledged that Narayanaswamy discloses some, but not all, of the elements of Applicant’s claims. The Examiner specifically has acknowledged that Narayanaswamy does not disclose a package having at least two individual portions of the dough, the raw specific volume, the baked specific volume, the acid leavening agent selected to have a low solubility, the specific amount of the basic ingredient, the solid fat index of the barrier material, the container is a pouch or cup, the container is a cup, and the type of barrier material claimed.

Gulstad et al disclose dough compositions that have an intermediate moisture level. The Examiner has argued that Gulstad et al disclose that the dough uses encapsulated basic and encapsulated acidic ingredients, the use of leavening agents, which are only nominally active at room temperature or by protecting the agents, and acidic ingredients that are only nominally active at room temperature.

Ray et al disclose refrigerated biscuit dough with a topping. The Examiner has argued that Ray et al disclose that the refrigerated dough product comprises a single piece of product in a container.

The Examiner has taken the position that it would be obvious to package the dough of Narayanaswamy in individual portions because it is “notoriously” well known to package a biscuit as an individual dough piece as exemplified by Ray et al. The Examiner further argues that it would be obvious to package the dough into individual portions if one wanted a plurality of pieces within the same container because it would have been readily apparent to one skilled in the art.

The Examiner still further argues that it would have been obvious to choose the acidic ingredient from the materials disclosed to be nominally active at below baking temperature as taught by Gulstad et al to ensure the delaying of a chemical reaction as this would further the objective of preventing reaction between the basic ingredient and the acidic ingredient until baking. The Examiner goes on to argue that Narayanaswamy et al disclose that the acidic ingredient includes sodium aluminum phosphate, and sodium acid pyrophosphate. The Examiner then concludes that it is obvious that the acidic ingredient has the solubility as claimed.

Applicant submits that these arguments do not withstand a reasoned review and that the Examiner has failed to establish a *prima facie* case of obviousness to support the rejection of claims 1, 3, 8, 10-13, 15, 16, 20, 22, 23, 25, 26, 36, 43, 59-65 under 35 U.S.C. 103(a).

It is undisputed that Narayanaswamy et al do not disclose that the non-encapsulated acidic active ingredient must have a low solubility (i.e. a solubility of greater than 35 kcal/mole) in the bulk dough composition below baking temperature and to be substantially soluble in the bulk dough composition during baking. Rather, Narayanaswamy et al discloses the use of a variety of acidic active ingredients without providing any details regarding the characteristics of any of them. In fact, a majority of the acidic active ingredients disclosed by Narayanaswamy et al does not satisfy the solubility requirements of the present claims. This is a clear teaching by Narayanaswamy et al that the disclosed dough product is fine without any further modification. Consequently, not only does Narayanaswamy et al fail to recognize that the solubility of the basic active ingredient has any importance at all, this reference provides no reason or motive to make any changes to his composition.

Gulstad et al fails to cure this fundamental deficiency of Narayanaswamy. Like Narayanaswamy et al, a majority of the acidic active ingredients disclosed by Gulstad et al do not satisfy the solubility requirements of the present claims. Therefore, Gulstad fails to provide any reason why Narayanaswamy can or should be modified to employ a non-encapsulated acidic ingredient that is substantially insoluble in the bulk dough composition below baking temperature yet is substantially soluble in the bulk dough composition during baking.

Ray et al also fails to cure the fundamental deficiency of Narayanaswamy. It is silent with regard to the nature and specifics of leavening agents. As a result, it cannot provide any reason why one could or should modify Narayanaswamy to employ the required non-encapsulated acidic ingredient.

Narayanaswamy and Gulstad each specifically disclose the use of the same three acidic leavening agents. Ray does not disclose any specific acidic leavening agents. The acidic leavening agents disclosed by Narayanaswamy and Gulstad are sodium aluminum phosphate (SALP), sodium acid pyrophosphate (SAPP), and monosodium phosphate (MCP). The solubility values of these acidic leavening agents are:

SALP 37.7 kcal/mole

SAPP 27.5 kcal/mole/33.7 kcal/mole

MCP 16.8 kcal/mole.

Thus, of the three specific acidic leavening agents disclosed, only one (SALP) has a solubility value that meets the solubility limitation required in the claims (i.e. 22.4% less for SAPP and 52% less for MCP). Thus, neither Narayanaswamy nor Gulstad makes it obvious that the acidic active ingredient required by the present claims must have the solubility as claimed.

In light of the foregoing, it is clear that the Examiner's logic that it is flawed as it is not possible, nor would be obvious, to choose the required acidic active ingredient from those disclosed by Gulstad in order to further the objective of preventing reaction between the basic and acidic active ingredients until baking is flawed.

First, Narayanaswamy clearly teaches that limiting the selection of the acidic active ingredients to those required by the claims is unnecessary. Second, Gulstad does nothing to suggest that further preventing the reaction between the basic and active ingredients is either needed or of any benefit. Third, Gulstad provides no criteria for selecting one acidic active ingredient over another so that one of skill in the art would know what class of acidic active ingredients to choose.

It is respectfully submitted that the combination of Narayanaswamy with Gulstad and Ray cannot render the present invention obvious under 35 U.S.C. 103(a) unless the Examiner has used impermissible non-statutory hindsight analysis.

The determination of obviousness under 35 U.S.C. 103(a) is a legal conclusion based upon factual evidence. *See KSR International Co. v. Teleflex Inc. et al.* 127 S. Ct. 1727 (U.S. 2007). In KSR, the Supreme Court reiterated that determination of obviousness depends upon (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the pertinent art; and (4) an evaluation of any relevant secondary consideration. (See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1996.))

Therefore, the test for obviousness under § 103 must take into consideration the invention as a whole. This includes a consideration of the particular problem solved by the elements that define the invention. *Interconnect Planning Corp. v. Feil*, 744 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1985). The Examiner must, as one of the inquiries pertinent to any obviousness inquiry under 35 U.S.C. § 103, recognize and consider not only the similarities but also the critical differences between the claimed invention and the prior art. *In re Bond*, 910 F.2d 831, 834, 15 USPQ2d 1566 (Fed. Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 19971 (Fed. Cir. 1990).

Moreover, the Examiner must avoid hindsight. M.P.E.P. § 2143.01 (citing *In re Gordon*, 733 F.2d 900, 221 U.S.P.Q. 1125 (Fed. Cir. 1984)). That is, the Examiner cannot use the Applicant's structure as a "template" and simply select elements from the references to reconstruct the claimed invention. See *In re Gorman*, 933 F.2d 982, 987, 18 U.S.P.Q.2d (BNA) 1885, 1888 (Fed. Cir. 1991). The fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 16 USPQ2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01.

The Court in KSR reaffirmed that hindsight reasoning is improper and stated that "[a] fact finder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d at 1397. See also *Graham v. John Deere Co.*, 383 U.S. at 36, 148 USPQ at 474.

The Court of Appeals for the Federal Circuit (CAFC) has also recently revisited the determination of obviousness. In *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc.* [CITE] the CAFC held that a

flexible “teaching-suggestion-motivation” (TSM) test to establish a prima facie case of obviousness remains the primary guarantor against non-statutory hindsight analysis. In accord *see Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). The CAFC, quoting the Supreme Court, stated:

“...a flexible approach to the TSM test prevents hindsight and focuses on evidence before the time of the invention.” KSR *supra*.

The TSM test:

[A]sks not merely what the references disclose, but whether a person of ordinary skill in the art, possessed with the understandings and knowledge reflected in the prior art, and motivated by the general problem facing the inventor, would have been led to make the combination recited in the claims... From this it may be determined whether the overall disclosures, teachings, and suggestions of the prior art, and the level of skill in the art –i.e., the understandings and knowledge of persons having ordinary skill in the art at the time of the invention – support the legal conclusion of obviousness. (See *In re Kahn*, 04-1616, *16 (Fed. Cir. 2006)) (citations omitted).

While Kahn was decided before KSR, the guidelines set forth there remain appropriate even today.

It is clear that an obviousness analysis still requires a showing of some reason for combining the elements from the prior art in the claimed manner. *See Ortho-McNeil supra; Takeda Chemical Industries, LTD., and Takeda Pharmaceuticals North America, Inc. v. Alphapharm, Pty., Ltd. and Genpharm, Inc.* 492 F.3d 1350 (Fed. Cir. 2007). This showing must not be a general showing. Rather, it must be one that would have suggested making the specific modifications needed to achieve the claimed invention. See Takeda. See also *In re Jones*, 958 F.2d 347 (Fed. Cir. 1992); *Dillon*, 919 F.2d 688; *Grabiak*, 769 F.2d 729; *In re Lalu*, 747 F.2d 703 (Fed. Cir. 1984).

When these guidelines are applied to the present invention, it is clear that claims 1, 3, 8, 10-13, 15, 16, 20, 23, 256, 26, 36, 43 and 59-65 are not obvious over Narayanaswamy in view of Gulstad and Ray.

As previously noted, none of the references provide any reason why one should use a non-encapsulated low solubility acidic active ingredient in combination with the encapsulated basic ingredient. To the contrary, because Narayanaswamy and Gulstad each disclose more acidic ingredients that do not meet the required solubility parameter than those that do, an unbiased reading of these references suggests that one should use an acidic ingredient that does not meet the required solubility parameter. It is believed that a fair reading of these references would either be neutral with regard to the use of the specific acidic active ingredient teach required by the claim, or would teach away from the use of such an acidic active ingredient. In either case, there is no reason or motive to make the specific modifications necessary to achieve the present invention.

Claim 66 is patentable under 35 U.S.C. 103(a) over Narayanaswamy et al in view of Ray et al and Gulstad et al further in view of Schaible et al.

The deficiencies of the combination of Narayanaswamy, Gulstad and Ray have been previously discussed. Schaible does not overcome these deficiencies.

Schaible et al is cited for the proposition that it teaches it is known to wrap a food product in a plastic overwrap and then place the wrapped product in a corrugated box. It is the Examiner's position that this makes it obvious to pack the container of Narayanaswamy in another container.

Schaible is silent with respect to specific leavening agents. Therefore, it does not teach or suggest anything regarding acidic active ingredients and therefore does not suggest what features the acidic active ingredient must have.

Consequently, the addition of Schaible to the combination of Narayanaswamy, Gulstad, and Ray does not render claim 66 unpatentable under 35 U.S.C. 103(a).

Claims 67-70 are patentable under 35 U.S.C. 103(a) over Narayanaswamy et al in view of Rea et al and Gulstad et al further in view of Rea et al and Lonergan et al.

The deficiencies of the combination of Narayanaswamy, Gulstad and Ray have been previously discussed. Rea et al and Lonergan et al do not overcome these deficiencies.

Rea and Lonergan are each cited for various packaging aspects. Neither of these references describes the use of an acidic active leavening ingredient. Thus, the addition of Rea and Lonergan to the combination of Narayanaswamy, Gulstad, and Ray does not suggest what must be done to achieve the present invention and does not render claims 67-70 unpatentable under 35 U.S.C. 103(a).

Conclusion

In view of these remarks, it is respectfully submitted that all of the pending claims are in condition for allowance. Accordingly, it is respectfully submitted that the Examiner's rejection of all of the claims under 35 U.S.C § 103 be withdrawn on this appeal.

Respectfully Submitted,

Dated: November 19, 2008

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#47901

VIII. Appendix - Claims

1. A packaged dough product comprising a low pressure container having therein at least two individual portions of a chemically leavened dough product, wherein each portion comprises an encapsulated basic active ingredient, a non-encapsulated acidic active ingredient, and a barrier material, wherein

at below baking temperature the barrier material encapsulates the basic active ingredient and separates the basic active ingredient from the non-encapsulated acidic active ingredient to inhibit reaction of basic active ingredient and acidic active ingredient,

the non-encapsulated acidic active ingredient is selected to have a solubility of greater than 35 kcal/mole in the dough composition below baking temperature and to be substantially soluble in the bulk dough composition during baking,

the barrier material degrades at or above the baking temperature to allow the basic active ingredient and the acidic active ingredient to come into contact in the dough composition and react to substantially leaven the dough composition during baking.

2. (Cancelled)

3. The packaged dough product of claim 1 wherein the dough composition contains from about 0.25 to about 2 wt% basic active ingredient encapsulated in the barrier material, and an amount of acidic active ingredient to neutralize the encapsulated basic active ingredient.

4-7. (Cancelled)

8. The packaged dough product of claim 1 wherein the acidic active ingredient is sodium aluminum phosphate.

9. (Cancelled)

10. The packaged dough product of claim 1 wherein the basic active ingredient is soluble in a water phase of the dough composition at one or more of a processing or refrigeration storage temperature.

11. The packaged dough product of claim 1 wherein the basic active ingredient is chosen from the group consisting of sodium bicarbonate, potassium bicarbonate, ammonium bicarbonate, and combinations thereof.

12. The packaged dough product of claim 1 wherein the barrier material has a melting temperature of at least 90°F.

13. The packaged dough product of claim 12 wherein the barrier material comprises a fat-type barrier material selected from the group consisting of palm oil, palm kernel oil, canola oil, a synthetic analog of palm kernel oil or canola oil, and combinations thereof.

14. (Canceled)

15. The packaged dough product of claim 1 wherein the encapsulated particles have an average size in the range from about 100 to about 420 microns.

16. The packaged dough product of claim 1 wherein the basic active ingredient is sodium bicarbonate.

17-19. (Cancelled)

20. The packaged dough product of claim 1 comprising encapsulated particles comprising basic active ingredient particulates coated by barrier material, and further comprising encapsulated particles comprising acidic active ingredient particulates coated by barrier material.

21. (Canceled)

22. The packaged dough product of claim 20 wherein the barrier materials are the same or different, and each independently has a melting point in the range from about 90°F to about 160°F.

23. The packaged dough product of claim 20 wherein the barrier materials are the same or different and independently comprise a vegetable oil chosen from the group consisting of palm kernel oil, canola oil, a synthetic analog of palm oil, palm kernel oil or canola oil, and combinations thereof.

24. (Cancelled)

25. The packaged dough product of claim 20 wherein the acidic active ingredient is selected from the group consisting of sodium aluminum phosphate, sodium aluminum sulfate, sodium acid pyrophosphate, monosodium phosphate, monocalcium phosphate monohydrate, anhydrous monocalcium phosphate, dicalcium phosphate dihydrate, and mixtures thereof.

26. The packaged dough product of claim 20 wherein the acidic active ingredient is selected from the group consisting of sodium aluminum phosphate, sodium acid pyrophosphate, and mixtures thereof.

27-35. (Cancelled)

36. The packaged dough product of claim 1 wherein
the basic active ingredient is encapsulated by a barrier material having a
solid fat index of at least about 50% at 75°F,
the acidic active ingredient is not encapsulated.

37-42. (Cancelled)

43. The packaged dough product of claim 1, wherein the dough composition is
refrigeration stable such that no more than 0.46 cubic centimeters per gram of carbon
dioxide is released from the dough composition over a twelve week period of storage at
about 45°F.

44-58. (Cancelled)

59. The packaged dough product of claim 1, wherein the encapsulated basic active
ingredient has an activity in the range from about 60 percent to about 70 percent.

60. The packaged dough product of claim 1 wherein the non-pressurized container
comprises a pouch or cup.

61. The packaged dough product of claim 1 wherein the dough composition has a raw
specific volume in the range from about 1.0 to about 1.6 cubic centimeters per gram, and
the dough composition can be baked to a specific volume of at least about 2.0 cubic
centimeters per gram.

62. The packaged dough product of claim 1 wherein the encapsulated basic active
ingredient has an activity in the range from about 55 percent to about 70 percent.

63. The packaged dough product of claim 1 wherein the dough composition, when stored
at refrigerator conditions for a time-period of at least 12 weeks, experiences less than 35

percent expansion during a time period beginning upon completion of the dough composition preparation and continuing through packaging and refrigerated storage.

64. The packaged dough product of claim 1 wherein the container is non-pressurized.

65. The packaged dough product of claim 1 having no pressure release upon opening.

66. The packaged dough product of claim 1 further comprising an outer non-pressurized package.

67. The packaged dough product of claim 1 wherein the low pressure container further comprises a headspace therein, the headspace comprising at least a partial vacuum.

68. The packaged dough product of claim 67 wherein the headspace has less than 0.20 micromoles of O₂ per square centimeter of dough surface area.

69. The packaged container of claim 68 wherein the headspace is of sufficient volume to accommodate outgassing of the dough product during refrigerated storage without noticeable change in the container appearance.

70. The packaged dough product of claim 68 wherein the headspace has been purged with N₂.

IX. Appendix - Evidence

There is no evidence to be included.

X. Appendix - Related Proceedings

There are no related appeals or interferences.